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No. 83-581

In the Supreme Court of the United States

OCTOBER TERM, 1983

HAROLD HAIMOWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the circumstances of this case, the trial judge abused his discretion in refusing to grant petitioner's request for the time to locate and the opportunity to call surrebuttal witnesses to support petitioner's character for truthfulness.

2. Whether a search warrant affidavit must disclose all known evidence reflecting adversely on an informant and whether a warrant that does not contain such information is defective even if it would still support probable cause if all such information were included.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A48) is reported at 706 F.2d 1549.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1983. A petition for rehearing was denied (Pet. App. A50-A52) on August 15, 1983. The petition for a writ of certiorari was filed on October 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiracy to embezzle

by filing false loan applications with the Small Business Administration, in violation of 18 U.S.C. 371; four counts of making false statements, in violation of 18 U.S.C. 1001; and four counts of possessing false documents with intent to defraud the United States, in violation of 18 U.S.C. 1002. Petitioner was sentenced to five years' imprisonment followed by a two-year period of probation. He was also fined $20,000. The court of appeals affirmed (Pet. App. A1-A48).

The facts underlying petitioner's convictions are set forth fully in the opinion of the court of appeals and may be briefly summarized as follows. Pet. App. A4-A14. Petitioner was an attorney in Jacksonville, Florida. In the fall of 1979, Peter Abbott sought petitioner's assistance in locating a restaurant for sale in the $50,000 to $100,000 price range. Petitioner put Abbott in contact with the chairman of the local zoning board, who arranged for Abbott to see several restaurants, including Swain's Charbroiled Steakhouse, which was priced at between $300,000 and $325,000. Petitioner told Abbott that he might be willing to invest personally in the restaurant. After petitioner and Abbott had inspected the restaurant, petitioner offered to take a 10% ownership interest, with the financing for the purchase and renovation to be obtained through a Small Business Administration (SBA) loan. Abbott told petitioner that he could not get an SBA loan because of his previous bankruptcy and his record as a convicted felon. Nevertheless, Abbott agreed to have an SBA loan "packaged" by Robert Flude of Atlanta while petitioner attended to the details necessary for closing the sale. Petitioner negotiated the price with representatives of the restaurant's owners. Abbott supplied false background information to Flude for the loan package. Petitioner

also dealt with Flude, directing certain changes in the loan package in order to make it more attractive to the SBA. The loan package was forwarded from Flude to Abbott and then to petitioner, who provided the additional documents—the purchase agreement, property appraisals, insurance breakdowns, and an inflated estimate for the renovation work. Abbott also prepared and included with the package a fraudulent letter of recommendation (the basis for Count Two) and a fradulent employment verification (the basis for Count Three).

The loan proposal, for $450,000, was submitted to several banks and was ultimately approved by the American National Bank, where co-defendant Frederick Bacon was a vice-president. Bacon forwarded the loan proposal to the SBA which agreed to insure the loan if Abbott used $210,000 of his personal funds on the project, obtained insurance, provided a bondable architect and contractor, and arranged to transfer the liquor license. In addiiton, $192,847 of the $450,000 was to be held in escrow to be released through draws by the contractor. Petitioner prepared various false documents to feign compliance with the terms of the loan. These included a forged receipt for $30,000 as down payment on renovation work (the basis for Counts Five and Nine) and a forged receipt for $161,304 for inventory and equipment purchases (the basis for Counts Six and Eight).

The loan was closed on January 4, 1980. Of the $450,000 loan, about $170,000 was paid to the sellers, about $75,000 was given to Abbott as working capital, and $192,847 was held by the bank in escrow for construction work. When the original contractor could not provide a performance bond, petitioner met with co-defendant Harold Bloom, president of Blosam

Contractors, Inc., who agreed to sign a contract to do the work for a "stipulated sum" of $192,847. It was agreed, however, that Blosam would do the work for $100,000 and kick back the remainder to Abbott and petitioner. Petitioner received approximately $20,000 to $25,000 in kickbacks. Petitioner was not indicted on substantive charges of receiving kickbacks, but the kickback scheme was charged as part of the conspiracy.

ARGUMENT

1. Petitioner contends (Pet. 8-19) that the district court erred in refusing to permit him to present surrebuttal testimony supporting his credibility as a witness.

Petitioner testified in his own behalf at trial but chose not to present character witnesses in his defense case-in-chief. As petitioner's counsel noted at trial, this was a considered decision (Tr. 8157). Other defendants called character witnesses at that time. In rebuttal, the government called two witnesses who testified briefly that petitioner's reputation for truthfulness was not good and that in their opinion he was not truthful. After the government had rested, a sidebar conference regarding unrelated procedural matters took place. Tr. 8169-8173. Petitioner made no indication that he wished to call surrebuttal witnesses. The district court then announced that the presentation of evidence had concluded and dismissed the jury for the night.[1] Tr. 8174. Only then did petitioner's counsel request "some time to locate at the most two witnesses to testify" regarding petitioner's

[1] Petitioner's suggestion (Pet. 6) that the district court did not afford him an opportunity to request surrebuttal prior to announcing the close of the evidence is not supported by the record (Tr. 8169-8175).

credibility. Tr. 8175. The district court declined to reopen the testimony in view of the possibility that the jury might give undue weight to new evidence received after the announced close of the case (Pet. App. A42-A44; Tr. 8174-8175).

Whether to allow the presentation of evidence in surrebuttal is a decision left to the sound discretion of the district court. *United States* v. *Wilford*, 710 F.2d 439 (8th Cir. 1983); *United States* v. *Durnin*, 632 F.2d 1297 (5th Cir. 1980); *United States* v. *Sadler*, 488 F.2d 434 (5th Cir.), cert. denied, 417 U.S. 931 (1974); *Turner* v. *United States*, 441 F.2d 736 (5th Cir. 1971). There was no abuse of discretion by the district court in this case.

Petitioner argues (Pet. 8-19) that the district court should have permitted him to call surrebuttal witnesses to respond to the government's attack upon his credibility. We do not dispute the contention that such testimony should at times be allowed when the prosecution presents rebuttal testimony attacking the defendant's character for truthfulness by opinion or reputation evidence (see Fed. R. Evid. 608(a)(2)). However, under the facts of this case, the district court did not abuse its discretion.

First, although petitioner had the opportunity to do so, he did not express any desire to call surrebuttal witnesses until after the court had announced that presentation of evidence had ended. The trial judge concluded that permitting petitioner to reopen would place undue emphasis upon the surrebuttal testimony. This was a determination peculiarly within the province of the trial judge.

Second, petitioner requested not only permission to call surrebuttal witnesses but also "some time to locate" such witnesses. Thus, petitioner's request would have resulted in delay of unknown duration.

Finally, as the court of appeals observed (Pet. App. A46), the government witnesses who attacked petitioner's character for truthfulness did not inject any new issue into the case. Petitioner had been charged with numerous offenses involving false statements, and thus his character for truthfulness was at issue even before he took the stand.

Petitioner could have presented evidence regarding his truthful character as part of his case-in-chief. Fed. R. Evid. 404(a)(1); *Edgington* v. *United States*, 164 U.S. 361, 363 (1896); *United States* v. *Hewitt*, 634 F.2d 277, 279 (5th Cir. 1981); *Darland* v. *United States*, 626 F.2d 1235, 1238 (5th Cir. 1980), cert. denied, 454 U.S. 1157 (1982). For tactical reasons, he elected not to do so. Indeed, he apparently did not even locate such witnesses (assuming there were any to be found) so that they could be called without delay if he later changed tactics. The evidence against petitioner was not so fundamentally changed as a result of the rebuttal testimony in question that the district court was bound to permit petitioner to reopen his case and delay submission of the case to the jury until surrebuttal witnesses could be located.

2. Petitioner contends (Pet. 20-30) that the warrant authorizing the search of his office was defective because the affidavit relied upon information supplied by Peter Abbott but failed to disclose information known to the government that indicated that Abbott was not a reliable informant. There is no merit to this claim.

Pursuant to a search warrant issued on August 21, 1980, various documents were seized from petitioner's law office and later introduced in evidence at trial. These documents included petitioner's files concerning

Abbott's SBA loan application, the incorporation of Abbott's restaurant and various suits by creditor's against Abbott, as well as petitioner's notebooks of telephone messages and copies of letters to various persons (Pet. App. A14-A15). The affidavit supporting the application for the search warrant recited information provided by Abbott and by Judi Greenhut, a former employee of petitioner. Abbott described the events leading up to the January 1980 SBA loan fraud. He also stated that, as recently as July 22, 1980, he had personally observed various documents relating to the fraud in a file in petitioner's office (Search Warrant 3-4). Greenhut confirmed that, as of June 1980, the files containing the loan documents were in petitioner's office and that it was the practice in petitioner's office to retain such documents indefinitely (Search Warrant 5-6). Pet. App. A15.

Petitioner complains (Pet. 23-25) that the search warrant affidavit omitted information that was known to the government and that, if disclosed, would have cast doubt upon Abbott's credibility. Relying on *Franks* v. *Delaware*, 438 U.S. 154 (1978), which concerned an affidavit alleged to contain deliberately or recklessly false statements, petitioner argues (Pet. 29) that a hearing "must be held to allow [him] to prove * * * that the FBI affidavit intentionally or recklessly withheld information material to the issue of probable cause." Petitioner's argument would extend *Franks* far beyond cases in which the prosecution has made an affirmative misrepresentation in applying for a search warrant to cases in which the government merely failed to disclose information bearing upon an informant's credibility. No court of appeals has accepted this argument, and it would plainly be unworkable. Requiring the government to

compile and disclose in a search warrant affidavit all the evidence in its possession that might undermine an informant's credibility or otherwise negate a finding of probable cause would be extremely burdensome and time-consuming and would frequently make it impossible for the government to apply for a warrant within the time limits imposed by the needs of fast-paced investigations. See *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 20-21. Consequently, if petitioner's rule were adopted, "police might well resort to warrantless searches" (slip op. 21).

Not only would it be a formidable task to locate, assemble, and present all evidence that might have a bearing upon an informant's credibility, but disclosure of such information can sometimes endanger the informant or jeopardize an ongoing investigation. At trial, when an informant is called as a witness, such possibilities must be carefully assessed. But the government cannot reasonably be expected to make decisions regarding such matters during the often hectic process of preparing a search warrant application.[2] As this Court recently reiterated, search warrant affidavits " 'are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity * * * have no

[2] No such duty to disclose applies in other probable cause determinations, such as the return of an indictment. For example, although a prosecutor may not deliberately mislead a grand jury (*United States* v. *Lame*, 716 F.2d 515, 518 (8th Cir. 1983)), the prosecutor clearly is not required to present all evidence bearing upon the credibility of grand jury witnesses (*United States* v. *Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir.), cert. denied, No. 82-6149 (May 16, 1983)). There is no basis for imposing such a requirement when an application is made for a search warrant. Even greater dispatch is required in this context.

proper place in this arena.'" Slip op. 20 (quoting *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965)).[3]

In any event, even if *Franks* were extended to impose a duty to disclose, suppression of the seized evidence would not be required. *Franks* stated that even where an affidavit contains deliberate or reckless falsehoods, suppression of evidence is not required unless the false statements were needed to establish probable cause. Here, the court of appeals concluded that even if all the adverse evidence regarding Abbott's credibility had been placed in the affidavit, it would still have established probable cause (Pet. App. A26-A27).[4] As the court noted, "[t]he affidavit con-

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[3] Petitioner's reliance on *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), is far-fetched. *Gates* abandoned the rigid two-pronged test adopted in *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969), for determining whether an informant's tip establishes probable cause for issuance of a warrant. In its place, *Gates* "reaffirm[ed] the totality of the circumstances analysis that traditionally has informed probable cause determinations" (slip op. 23). Petitioner's rule would be completely inconsistent with the traditional approach to probable cause determinations. Moreover, *Gates* emphasized that search warrant affidavits are typically prepared in haste by nonlawyers and that elaborate technical rules should not be imposed (slip op. 20-21).

[4] Petitioner incorrectly suggests (Pet. 30) that all the information supplied by Abbott would have to be struck if *Franks* were extended to impose a duty to disclose. *Franks* did not require the striking of all the information supplied by an affidavit found to contain deliberate or reckless false statements. Instead, the Court merely required that the false statements be excluded in assessing probable cause. If, as petitioner maintains, the failure to disclose is tantamount to a misrepresentation, then the appropriate remedy where there has been such a failure is to include the omitted information in assessing probable cause.

tain[ed] detailed, firsthand information that is specific in its allegations, and is therefore 'self-corroborating' " (*id.* at A21, A27), and some of the information supplied by Abbott was "corroborated in the affidavit by statements made by Judi Greenhut, [petitioner's] former secretary, whose credibility is unassailed" (*id.* at A22, A27).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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